

## THE IRRELEVANCE OF NON-RECOGNITION TO AUSTRALIA'S ANTARCTIC TERRITORY TITLE

SHIRLEY V. SCOTT\* 

**Abstract** It is often noted that few States recognize the seven national claims to Antarctic territory. Australia, one of the claimants, asserts title over 42 per cent of the continent and yet only four States have recognized its claim. Some States have expressly rejected Australia's claim. This article examines the legal significance of such widespread non-recognition. It does so through interrogating the evolution of the legal regime of territorial acquisition, its historical function and application to Antarctica, and relevant decisions of international courts and tribunals. The article identifies, and distinguishes amongst, several categories of non-recognition and considers the relevance of each. The analysis finds that the seemingly meagre level of recognition of Australia's title to the Australian Antarctic Territory does not detract from the validity of that title. This article points to possible reasons as to why a number of polar scholars may have suggested otherwise.

**Keywords:** public international law, Antarctica, sovereignty, Australian Antarctic Territory, non-recognition, occupation, recognition, claimant, Antarctic Treaty System, polar, territory.

### I. INTRODUCTION

The Antarctic continent is governed by the Antarctic Treaty System, founded on the 1959 Antarctic Treaty.<sup>1</sup> By Article IV of the Treaty, existing territorial claims, rights and bases of claims are effectively 'frozen' for the life of the Treaty.<sup>2</sup> Sovereignty is never far below the surface in Antarctic law and politics, however, because, whilst the Treaty has facilitated international cooperation in the absence of a determination of sovereignty, it does not require claimant States to renounce their claims.

\* Professor of International Law and International Relations and Head of the School of Humanities and Social Sciences, UNSW Canberra, [s.scott@unsw.edu.au](mailto:s.scott@unsw.edu.au). This research was supported by the Australian Research Council's Discovery Grant Scheme (DP19010124 Geopolitical Change and the Antarctic Treaty System). I would like to thank Roberta C. Andrade, Jeffrey S. McGee and Tim Stephens for their insightful comments on an earlier draft of this article.

<sup>1</sup> Antarctic Treaty (adopted 1 December 1959, entered into force 23 June 1961) 402 UNTS 71.

<sup>2</sup> The seven claimant States are: The United Kingdom, Norway, New Zealand, France, Chile, Argentina and Australia.

Australia asserts sovereignty over the Australian Antarctic Territory (AAT), an area of 5.9 million square kilometres or 42 per cent of the Antarctic continent.<sup>3</sup> The literature on Antarctic sovereignty has often noted that only four States recognize Australia's claim. This article does not aim to make a comprehensive assessment of Australia's sovereign rights over the AAT. It instead focuses on the legal significance for Australia's title of the fact that so few States have given positive recognition to Australia's sovereignty.

The article begins with a review of the legal basis for Australia's territorial claim in Antarctica before pointing to the assumption, prevalent in relevant literature, that the lack of recognition detracts in some way from the strength of Australia's title. It then interrogates the international legal regime of territorial acquisition to determine whether the assumption is correct and concludes that the relative lack of formal recognition *does not* detract from the validity of Australia's title to the AAT.

## II. AUSTRALIA'S TERRITORIAL CLAIM IN ANTARCTICA

According to Australia's contribution to a 1984 United Nations study on Antarctica, Australia's claim to sovereignty over the AAT is based on 'acts of discovery and exploration by British and Australian navigators and explorers going back to the time of Captain Cook, and subsequent continuous occupation, administration and control'.<sup>4</sup> Formal proclamations were made on behalf of the British Crown in what became the AAT, including during Shackleton's 1907–09 expedition, Scott's 1910–13 expedition and Mawson's expedition of 1929–31.<sup>5</sup> In 1926, the British Government decided, in consultation with the Australian Government, to transfer to Australia the areas of Antarctica closest to the Australian continent.<sup>6</sup> This was implemented by Order-in-Council of 7 February 1933, the Order defining the AAT as 'that part of the territory in Antarctic seas which comprises all the islands and territories other than Adélie Land situated south of the 60<sup>th</sup> degree of South Latitude and lying between the 160<sup>th</sup> degree of East Longitude and the 45<sup>th</sup> degree East Longitude'.<sup>7</sup>

Australia assumed authority over the AAT by Act of 13 June 1933.<sup>8</sup> Australia first asserted a continental shelf off the AAT in 1953. The Australian Antarctic Territory Act 1954 provided for the application of Australian legislation to the AAT.<sup>9</sup> Australia participated in negotiations for the Antarctic Treaty in the late 1950s and was an original signatory of the Treaty.<sup>10</sup> In 1973, Australia proclaimed a three-nautical-mile territorial sea around all its territory including the AAT, and in 1990 extended this to

<sup>3</sup> Australian Government, Geoscience Australia, 'Antarctica' <<http://www.ga.gov.au/scientific-topics/marine/antarctica>>.

<sup>4</sup> United Nations General Assembly, 'Question of Antarctica. Study requested under General Assembly Resolution 38/77. Report of the Secretary-General, Part Two. Views of States' vol 1, UN Doc A/39/583 (Part II) (29 October 1984) 39–40. For context on the Study, see PJ Beck, 'The United Nations' Study on Antarctica, 1984' (1985) 22(140) *Polar Record* 499–504.

<sup>5</sup> *ibid* 40.

<sup>6</sup> *ibid*.

<sup>7</sup> 'Order-in-Council by King in Council', 7 February 1933, reproduced in J Cotton (ed), *Australia and the World 1920–1930*. Australian Department of Foreign Affairs and Trade Documents on Australian Foreign Policy (UNSW Press 2019) 838.

<sup>8</sup> 'Australian Antarctic Territory Acceptance Act 1933', 13 June 1933, reproduced in J Cotton (ed), *Australia and the World 1920–1930*. Australian Department of Foreign Affairs and Trade Documents on Australian Foreign Policy (UNSW Press 2019) 842.

<sup>9</sup> UNGA (n 4), 40.  
<sup>10</sup> Australia deposited its instrument of ratification of the Antarctic Treaty on 23 June 1961 <<http://disarmament.un.org/treaties/a/antarctic/australia/rat/washington>>.

12 nautical miles. Australia proclaimed an exclusive economic zone (EEZ) adjacent to the AAT in 1994 and in 2004 submitted its claim to an extended continental shelf off the AAT to the Commission on the Limits of the Continental Shelf.<sup>11</sup> Australia's EEZ off the AAT constitutes approximately one quarter of its total EEZ,<sup>12</sup> and the AAT, together with its maritime zones, represents an area more than twice the size of the Australian continent.<sup>13</sup> Australia has engaged in ongoing scientific research in Antarctica and continues to be an influential player within the Antarctic Treaty System.<sup>14</sup>

### III. REFERENCES TO AUSTRALIA'S ANTARCTIC CLAIM AND THE QUESTION OF NON-RECOGNITION

Writing in 1982, Triggs weighed up various factors to determine the validity of Australia's sovereignty claim as it stood in 1961. She first provided factors supporting the validity of the claim, including its intent to act as sovereign and its 'continuous and peaceful' settlement, then continued: 'On the other hand few States have recognized Australian sovereignty and two have specifically denied it'.<sup>15</sup> This has become something of a common refrain in literature referencing Australia's Antarctic claim. It is worth considering statements of several polar scholars so as to discern their implicit assumptions regarding the legal significance of recognition or its absence. Rayfuse, for example, commented:

Despite its pretensions, however, and the recognition of the validity of its claims by the other claimant states, Australian sovereignty over the AAT has never been recognised by other states and, indeed, has been expressly contested by the United States and Russia.<sup>16</sup>

Scott made a somewhat similar comment in relation to all of the claims. After noting that a full assessment of the claims was beyond the scope of her article, she proceeded:

Nevertheless, it can be safely asserted that none of the claims are underpinned by overwhelming evidence supporting the exercise of sovereignty in Antarctica, and, moreover, all of the claims are unrecognized by the international community more generally.<sup>17</sup>

After noting that Australia's claim is the largest and that five other States have made territorial claims, Crawford and Rothwell noted:

<sup>11</sup> DR Rothwell and SV Scott, 'Flexing Australian Sovereignty in Antarctica: Pushing Antarctic Treaty Limits in the National Interest?' in LK Kriwoken, J Jabour and AD Hemmings (eds), *Looking South. Australia's Antarctic Agenda* (Federation Press 2007) 12–13.

<sup>12</sup> Australian Government, Geoscience Australia, 'Oceans and Seas' <<http://www.ga.gov.au/scientific-topics/national-location-information/dimensions/oceans-and-seas>>.

<sup>13</sup> T Stephens and B Boer, 'Enforcement and Compliance in the Australian Antarctic Territory: Legal and Policy Dilemmas' in Kriwoken, Jabour and Hemmings, *Looking South* (n 11) 54.

<sup>14</sup> See, *inter alia*, S Harris, *Australia's Antarctic Policy Options* (ANU Centre for Resource and Environmental Studies 1984); Kriwoken, Jabour and Hemmings, *Looking South* (n 11); and MG Haward and T Griffiths (eds), *Australia and the Antarctic Treaty System: 50 Years of Influence* (UNSW Press 2011).

<sup>15</sup> G Triggs, 'Australian Sovereignty in Antarctica. Part II' (1982) 13(3) MULR 318.

<sup>16</sup> R Rayfuse, 'Australia's External Territories and International Law' in DR Rothwell and E Crawford (eds), *International Law in Australia* (3rd edn, Lawbook Co. 2017) 555–6.

<sup>17</sup> KN Scott, 'Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years' (2009) 20(1) Yearbook of International Environmental Law 13.

But a number of these claims overlap, some drastically, and the claims are not generally recognized as valid by non-claimant States. In particular two States with extensive and continuing activities in the Antarctic, the United States and the Soviet Union, do not recognize any claims to sovereignty there, although they reserve the right, by way of so-called 'bases of claim', to make their own claims in the future.<sup>18</sup>

Dodds has written:

To put it bluntly, the vast majority of the international community do not recognise the claims of Argentina, Australia, Chile, France, Norway, New Zealand and the United Kingdom.<sup>19</sup>

Hemmings wrote in relation to Antarctic claims:

So, to state the obvious perhaps, recognition of Antarctic claims, including Australia's, has hitherto been derisory, and this situation seems unlikely to change in the foreseeable future.<sup>20</sup>

As this set of quotes exemplifies, references to the relative paucity of recognition of Australia's Antarctic claim, or of the set of claims, tend to imply, to varying degrees, that an absence of widespread acts of recognition detracts from the strength of a claim. This raises the question as to just what is the significance for Australia's title to the AAT of the fact that so few other States have recognized it? The quotes also bring into question whether there is any legal significance in the distinction between non-recognition in the sense of an absence of statements of recognition, as per the above quoted statement by Hemmings, and non-recognition in the sense of affirmative statements of non-recognition, as per the comment by Rayfuse.

#### IV. THE REGIME OF TERRITORIAL ACQUISITION

The principle of intertemporal law requires that the act creative of a right be subject to the law in force at the time the right arose.<sup>21</sup> The international legal regime within which Australia situates its claim to territorial title in Antarctica developed during the period of 'new colonialism' from about 1870–1910, and has been further clarified in a number of awards and international judicial decisions in the twentieth and twenty-first centuries. The General Act of the Berlin Conference (Act of Berlin or General Act),<sup>22</sup> signed on 26 February 1885,<sup>23</sup> codified the fundamental agreed rules as they had

<sup>18</sup> J Crawford and DR Rothwell, 'Legal Issues Confronting Australia's Antarctica' (1990–91) 13 AustYBIL 54.

<sup>19</sup> K Dodds, 'Sovereignty Watch: Claimant States, Resources, and Territory in Contemporary Antarctica' (2011) 47(3) Polar Record 232.

<sup>20</sup> AD Hemmings, 'Problems Posed by Attempts to Apply a Claimant's Domestic Legislation Beyond Its Own Nationals in Antarctica' (2008) 11(3–4) APJEL 208.

<sup>21</sup> *Island of Palmas (Netherlands v United States)* (1928) 2 RIAA 829 14 (*Island of Palmas Case*).

<sup>22</sup> 'General Act of the Conference of Berlin, relative to the Development of Trade and Civilization in Africa; the free Navigation of the Rivers Congo, Niger, & the Suppression of the Slave Trade by Sea and Land; the occupation of Territory on the African Coasts, & Signed at Berlin, 26<sup>th</sup> February, 1885' in E Hertslet, RW Brant and HL Sherwood, *The Map of Africa by Treaty* (Printed for HMSO by Harrison and Sons 1909) 484.

<sup>23</sup> This was the outcome document of the Berlin Conference which had begun on 24 November 1884.

evolved through State practice in relation to the African continent, although it was widely accepted that the provisions of the General Act were more generally applicable.<sup>24</sup> As the African territorial division was reaching an end, the Act of Berlin was abrogated by Article 13 of the 1919 Convention revising the General Act of Berlin of 26 February 1885 and the General Act and Declaration of Brussels of 2 July 1890.<sup>25</sup> The regime further evolved through its application to Antarctica in the first half of the twentieth century. Territorial acquisition of *terra nullius* was to be based on discovery, followed by annexation and effective occupation.

Although *terra nullius* has been defined in various ways, there was no doubt as to its applicability to uninhabited areas.<sup>26</sup> The Berlin Conference confirmed the centrality to the regime of effective occupation. Occupation dated from Roman law, by which a valid title to private property could be obtained by taking physical possession of *res nullius* with the intention of holding it as one's own.<sup>27</sup> By Article XXXV of the General Act, Signatory Powers agreed to:

Recognize the obligation to insure the establishment of authority in regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and of transit under the conditions agreed upon.

It was now self-evident that discovery alone was insufficient; discovery was said to confer an 'inchoate' (that is, incomplete) title, which may be perfected by more significant acts or activity.<sup>28</sup> Walker wrote in 1895 that the 'formal assumption of possession to continue legally effective must be followed by other acts of control or by an actual settlement in the territory within a reasonable period'.<sup>29</sup>

In the period between the two World Wars, the legal requirements for acquiring sovereign rights over non-contiguous territory were confirmed by three awards/judgments: the 1928 Arbitral Award of Max Huber in the *Island of Palmas* Case; the *Clipperton Island* Arbitral Award of 1931; and the 1933 judgment in the *Legal Status of Eastern Greenland* Case decided by the Permanent Court of International Justice (PCIJ). 'Effective occupation' was reaffirmed as the key concept; the *Palmas Island* Decision referred to title 'founded on a continuous and peaceful display of State authority'.<sup>30</sup> A distinction was thereby drawn between a State acquiring territory in the first place and maintaining sovereignty over that territory.

The PCIJ noted two essential elements of the latter: an intention or will to act as sovereign; and the adequate exercise or display of sovereignty.<sup>31</sup> But there were no absolute standards as to of what such exercise or display of sovereignty needed to consist and it did not need to be of a uniform nature throughout the territory in question. While a State might be expected to govern the population of its newly

<sup>24</sup> J Westlake, *International Law, Part I: Peace* (Cambridge University Press 1904) 107.

<sup>25</sup> 'Convention revising the General Act of Berlin, 26 February 1885, and the General Act and Declaration of Brussels, 2 July 1890, signed at Saint-Germain-en-Laye, 10 September 1919 (1921) 15 AJIL Supp 314–21.

<sup>26</sup> M Shaw, *Title to Territory in Africa. International Legal Issues* (Clarendon 1986) 31.

<sup>27</sup> TJ Lawrence, *The Principles of International Law* (DC Heath 1908) 147.

<sup>28</sup> IA Shearer, *Starke's International Law* (11th edn, Butterworths 1994) 148.

<sup>29</sup> TA Walker, *Manual of Public International Law* (Cambridge University Press 1895, reprinted RB Rothman 1984) 27–8.

<sup>30</sup> *Island of Palmas* Case (n 21) 24.  
<sup>31</sup> *Legal Status of Eastern Greenland (Denmark v Norway)* (1933) PCIJ Series A-B, No 5 (*Eastern Greenland Case*).

acquired territory, were the territory to be uninhabited, key would be that 'from the first moment when the occupying state makes its appearance there, [the territory in question is] at the absolute and undisputed disposition of that state'.<sup>32</sup> Huber explained that:

[m]anifestations of territorial sovereignty assume ... different forms, according to conditions of time and place. Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of a territory. The intermittence and discontinuity compatible with the maintenance of the right necessarily differ according as inhabited or uninhabited regions are involved ....<sup>33</sup>

Huber pointed to the fact that territory needs to be lawfully acquired but that, thereafter, such title 'shall prevail over *de facto* possession however well established'.<sup>34</sup> Emmanuel awarded Clipperton Island to France on the basis that France had legitimately acquired the island; the fact that it had not exercised authority there in a positive manner did 'not imply the forfeiture of an acquisition already definitely perfected'.<sup>35</sup> The PCIJ also pointed to occupation being relative, not only to the nature of the territory in question, but also to the title of any other national contender:

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.<sup>36</sup>

Effective occupation required 'manifestations of sovereignty legally more potent than those of the other claimant or claimants, or, in brief, proof of the better right'.<sup>37</sup> The reason for an emphasis on the *relativity* of title can be appreciated if the international legal regime of territorial acquisition is viewed in historical context.

#### V. THE PLACE OF RECOGNITION, NON-RECOGNITION, AND DISPUTATION IN THE REGIME OF TERRITORIAL ACQUISITION

In functional terms the law of territorial acquisition was not a body of law concerning the relationship between the claimant State and the territory in question, but one amongst colonising States; its purpose was to determine which European State could control which portion of territory, thereby helping avoid conflict amongst the colonising States.<sup>38</sup> Victor Emmanuel, arbitrator in the *Clipperton Island* Case, noted that signatory States were bound by the Act of Berlin 'in their mutual relations'.<sup>39</sup>

The claims by Australia to the AAT, the UK to the Falkland Islands Dependencies, France to Adélie Land, New Zealand to the Ross Dependency, and Norway to Queen Maud Land, are often presented as a series of discrete actions.<sup>40</sup> Thus, the UK claim is usually dated from its Letters Patent of 1908 and 1917; the New Zealand claim

<sup>32</sup> 'Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island', Decision rendered at Rome, 28 January 1931 (1932) 26(2) AJIL 390 (*Clipperton Island* arbitral award).<sup>33</sup> *Island of Palmas* Case (n 21) 9.<sup>34</sup> *ibid.*<sup>35</sup> *ibid.* 394.

<sup>36</sup> *Eastern Greenland* Case (n 31) 46/28.

<sup>37</sup> I Brownlie, *Principles of Public International Law* (4th edn, Clarendon 1990) 139.

<sup>38</sup> RMM Wallace, *International Law* (Sweet & Maxwell 1986) 81.

<sup>39</sup> *Clipperton Island* arbitral award (n 32) 394.

<sup>40</sup> Argentina and Chile also assert sovereign rights to portions of the Antarctic continent.

from a 1923 Order-in-Council made under the 1887 Imperial British Settlements Act; Australia's claim to the AAT from a 1933 British Order-in-Council that was then adopted in Australia by the Australian Antarctic Territory Acceptance Act; France's claim to Adélie Land was defined in a 1938 decree; and Norway's by proclamation of 1939. One might easily assume on the basis of references to the scant recognition of Australia's Antarctic title that such discrete acts of claim are followed by overt assertions of recognition and/or non-recognition by other members of the international community.<sup>41</sup>

In fact, however, the process of asserting sovereign rights to portions of the Antarctic territory was more complex than this portrayal suggests, involving considerable diplomatic interaction, which for these four States was undertaken primarily on a bilateral basis on something of a hub-and-spokes basis with the UK. The diplomatic correspondence included, for example, inquiries of other States and assertions of rights within specified boundaries. In Australia's case, it was therefore not simply a question of Australia making an announcement in 1933 and other States recognizing or not recognizing that claim. The AAT borders the claims of New Zealand at the 160th degree of East Longitude and of Norway at the 45th degree East, and is divided, at the 136th degree and 142th degree of East Longitude, by the claim of France. The UK had already undertaken relevant diplomatic exchanges with Norway and France, which then provided the context in which Australia could proceed. To the extent that the process incorporated positive statements of recognition, they were usually steps in a quid pro quo negotiation as opposed to stand-alone pronouncements.<sup>42</sup>

Signatories of the General Act were expected to notify other Signatory Powers of a claim. Article XXXV specified:

Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, hitherto without such possession, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

On 4 March 1907, Norway queried the position the UK had adopted in previous correspondence regarding UK rights to Graham Land and asked whether foreign governments had been notified of British occupation of Graham Land.<sup>43</sup> In its reply, the United Kingdom stated that 'it was not the practice of H.M. Government to notify foreign Governments of additions to British territory made by annexation, occupation or otherwise'.<sup>44</sup> In the *Clipperton Island* Award, Emmanuel did not think that a specific, formal act of notification was required, but there did seem to be an

<sup>41</sup> cf also comments such as: 'The uncertainty over the territorial claims [in Antarctica] stems from the fact that they are not universally recognized ...'. S Kaye and DR Rothwell, 'Australia's Antarctic Maritime Claims and Boundaries' (1995) 26(3) *Ocean Development & International Law* 197.

<sup>42</sup> The various sets of negotiations are set out in SV Scott, *The Political Interpretation of Multilateral Treaties* (Martinus Nijhoff 2004) 27–72.

<sup>43</sup> 'Norwegian Memorandum to the United Kingdom requesting Information on Territorial Rights over the South Orkney Islands, the South Shetland Islands and Graham Land' (4 March 1907) in WM Bush (ed), *Antarctica and International Law. A Collection of Inter-State and National Documents* (Oceana 1988) vol 3, 241–2.

<sup>44</sup> 'British Note to Norway giving information on British claims to the South Orkney Islands, South Shetlands Islands and Graham Land' (30 April 1907) in Bush *ibid* 245–7.



expectation that an assertion of sovereignty would be made known, most likely through being brought to the attention of other relevant States.<sup>45</sup>

This afforded an opportunity for another State that believed it had stronger title to make a counter claim. Whereas a State disagreeing with an assertion of sovereignty therefore needed to make a positive act of disputation, there was no expectation of a positive act of recognition.<sup>46</sup> Where it did occur it might be implied or made explicit; for example, in a multilateral treaty of which the two States concerned were both parties.<sup>47</sup> An implied act of recognition is what is referred to as acquiescence.

There are two ways in which an act of positive recognition was potentially significant. First, if a State were positively to recognize a claim, then that State was debarred from itself occupying any part of the territory in question,<sup>48</sup> and it would be very difficult for it at some later point to dispute it.<sup>49</sup> This is the principle of estoppel (that is, a legal principle that precludes a State from acting contrary to what was previously implied by an action or statement of that person). Second, the *Island of Palmas* Case suggested that positive acts of recognition such as a treaty between the States concerned could lend support to a claim, but that such a treaty would be decisive only to determining the relative strength of the respective rights to the territory in question of the Parties to that treaty; such a treaty would not impact the rights of a third Party.<sup>50</sup> A similar issue arose in the *Eastern Greenland* Case.<sup>51</sup>

In his Award in the *Island of Palmas* Case, Huber did not refer to lack of recognition on the part of third parties as impacting the respective rights of the United States or the Netherlands. To this extent, then, non-recognition was not part of the trajectory of divvying up territorial sovereignty and at face value would seem to be irrelevant to the validity of a claim to territorial acquisition.

#### VI. MORE RECENT INTERNATIONAL DECISIONS REGARDING TITLE TO TERRITORY

Our discussion has so far distinguished amongst three types of action in response to a positive assertion of a claim: positive recognition of the claim; an absence of reaction (that is, the claim is neither recognized nor rejected); and an active act of disputation in the sense of contesting the asserted title of another State whilst simultaneously advancing a case for oneself having superior title to the same territory. Notably, however, we have not identified a category of action by which a non-claimant third party explicitly states that it does not recognize title absent contesting the claim with evidence of a purportedly stronger title of its own. Nor has a category of States not themselves asserting rights to the same territory but making positive assertions of non-recognition, as has commonly been impliedly of legal significance in the literature on Antarctic sovereignty, featured in more recent decisions of international courts.

In its 2002 judgment in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the International Court of Justice recalled the statement by the PCIJ in the *Eastern Greenland* case regarding the need for a claim to sovereignty based on a display of authority as opposed to a treaty to have two elements: (i) 'the intention and will to act as sovereign'; and (ii) 'some actual exercise or display of

<sup>45</sup> *Clipperton Island* arbitral award (n 32) 394.

<sup>47</sup> *ibid* 68. <sup>48</sup> *ibid* 68, 69. <sup>49</sup> *ibid* 26.

<sup>51</sup> *Eastern Greenland* Case (n 31) 52.

<sup>46</sup> *Eastern Greenland* Case (n 31) 61.

<sup>50</sup> *Island of Palmas* Case (n 21) 18.



such authority' as well as the emphasis placed by the PCIJ on the *relative* nature of a claim.<sup>52</sup>

The Court found in favour of Malaysian sovereignty over the islands on the basis both that Malaysia had carried out legislative, administrative and quasi-judicial acts over a period of time, showing 'a pattern revealing an intention to exercise State functions in respect of the two islands', and that neither Indonesia nor its predecessor, the Netherlands, 'ever expressed its disagreement or protest'.<sup>53</sup> There was no consideration of positive recognition or acquiescence (implied recognition), of non-reactions or of acts of positive non-recognition on the part of third parties that were not also making claim to the same territory.

In *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*,<sup>54</sup> the Court once again took the approach by which it compared two competing claims to the same territory. The Court ruled in favour of Singapore on the basis that, while the Sultanate of Johor (Malaysia) had original title to Pedra Branca/Pulau Batu Puteh,<sup>55</sup> sovereignty over these islands had by 1980 passed to Singapore.<sup>56</sup> The Court assessed which State had enjoyed original title on the basis of whether there had been a display of sovereignty sufficient given the accessibility/habitability of the territory, and whether there had been any rival claims. It noted that authority does not need to have been displayed at every moment on every piece of the territory in question.<sup>57</sup>

The Court identified the 'critical date' at which the dispute between Singapore and Malaysia had crystalized. According to the Court, the critical date is important because it determines which acts to take into consideration for the purpose of establishing or ascertaining sovereignty. Acts taken after the critical date 'are in general meaningless for that purpose, having been carried out by a State which, already having claims to assert in a legal dispute, could have taken those actions strictly with the aim of buttressing those claims'.<sup>58</sup>

In order for a dispute to have crystallised, one State needed to have made a claim to which the other had protested. In respect of Pedra Branca/Pulau Batu Puteh, Malaysia had in 1979 made a formal claim through the publication of a map, which Singapore had protested by diplomatic Note of 14 February 1980,<sup>59</sup> rejecting Malaysia's claim and outlining its own basis of claim. This protesting differed from non-recognition as absence of affirmative statements of recognition, insofar as it involved a State with a competing claim disputing the claim of the first State while at the same time advancing its own claim. Affirmative statements of non-recognition would seem significant only if accompanied by the details of a competing claim.

<sup>52</sup> *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment (ICJ Rep 2002) <<https://www.icj-cij.org/files/case-related/102/102-20021217-JUD-01-00-EN.pdf>> 682.

<sup>53</sup> *ibid* 685.

<sup>54</sup> *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment (ICJ Rep 2008) <<https://www.icj-cij.org/files/case-related/130/130-20080523-JUD-01-00-EN.pdf>> 12. <sup>55</sup> *ibid* 37. <sup>56</sup> *ibid* 96. <sup>57</sup> *ibid* 28–9.

<sup>58</sup> *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)*, Judgment (ICJ Rep 2007) 697–8 [117] cited in *ibid* 19.

<sup>59</sup> Ministry of Foreign Affairs, Singapore, to Office of the High Commissioner for Malaysia, MFA 30/80, 14 February 1980, in *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Memorial of Singapore Annex 6 1099, <<https://www.icj-cij.org/files/case-related/130/130-20040325-WRI-02-05-EN.pdf>>.

So far as Australia's Antarctic claim is concerned, there can be little doubt that Australia did have original title over what had hitherto been *terra nullius*. This is true, even if—as alluded to in the quotation from Scott above—its display of authority appeared less than might have been expected in a more habited place, and even if it has not been applied equally to all of the territory for the whole period in question. There has never been the crystallisation of a dispute in relation to the AAT (such as prompted the cases between Indonesia, Malaysia and Singapore), by which a State has protested Australia's claim while advancing its own claim. Moreover, if no such dispute has arisen, there is also no basis for determining a critical date and no need to assess whether sovereignty has transferred to another State.<sup>60</sup>

#### VII. NON-RECOGNITION OF ANTARCTIC SOVEREIGNTY ON THE PART OF THE UNITED STATES

This prompts the question as to where the origins lie of the implicit attribution in Antarctic literature of legal import to a lack of positive statements of recognition of Australia's Antarctic title by non-claimant third parties. One reasonable explanation may be State practice on the part of the United States. The United States made no territorial claim during the period of claim-making, but there was considerable Antarctic exploration on the part of US nationals and in the 1920s and 1930s the US developed the position that it neither recognised any claims to territorial sovereignty nor asserted any claims of its own, while at the same time reserving such rights as it may have acquired.<sup>61</sup>

The former USSR is also generally understood to have adopted a position of non-recognition.<sup>62</sup> It reserved its rights to territory in Antarctica but it was in any case unlikely to have had grounds to make a claim. Even if some discoveries were to be attributed to Bellingshausen,<sup>63</sup> discovery alone is insufficient to establish title. The USSR did not deny the possibility of territorial claims to portions of the Antarctic continent.

The approach developed by the United States was reflected in the wording of Article IV of the Antarctic Treaty, which was designed to safeguard the positions of all original signatories. By Article IV(1) of the Treaty, Parties agreed to disagree as regards the status

<sup>60</sup> As noted by Bergin and Haward: 'significantly, no state actually disputes Australian sovereignty and unlike some other [claims, the AAT is] not subject to any counter-claims'. A Bergin and M Haward, *Frozen Assets: Securing Australia's Antarctic Future*. ASPI Strategic Insights No 34 (Australian Strategic Policy Institute 2007) <[https://s3-ap-southeast-2.amazonaws.com/ad-aspi/import/SI34\\_Frozen\\_assets.pdf](https://s3-ap-southeast-2.amazonaws.com/ad-aspi/import/SI34_Frozen_assets.pdf)> 5.

<sup>61</sup> UNGA, 'Question of Antarctica. Study requested under General Assembly Resolution 38/77. Report of the Secretary-General. Part Two: Views of States, Volume III' UN Doc A/39/583 (Part II) (9 November 1984) 101. For a list of some occasions on which the US expressed this position, see the notes to US09061948 'United States Paper on the Formulation of a United States Policy Regarding Antarctica (extract)' (9 June 1948) in Bush, *Antarctica and International Law* (n 43) 455.

<sup>62</sup> Note to UR02061958 'Soviet Note to the United States Accepting the United States Invitation to Attend an International Conference on Antarctica' in Bush, *Antarctica and International Law* (n 43) 212–14.

<sup>63</sup> E Tammiksaar 'The Russian Antarctic Expedition under the Command of Fabian Gottlieb von Bellingshausen and Its Reception in Russia and the World' (2016) 52 *Polar Record* 578.

of these claims;<sup>64</sup> Article IV(1)(c) provided that nothing contained in the Treaty was to be interpreted as 'prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica'.

It should be noted, however, that US officials had themselves concluded in 1939 that the US position was unlikely to detract from the strength of existing Antarctic claims. As one US official wrote to the President when urging a more proactive approach to claim-making:

I am inclined to believe ... that these naked reservations of American rights would, alone, have little practical weight in an ultimate settlement of Polar territorial questions when balanced against the positive steps to preserve their territorial rights which have been and are being taken by other countries pursuing vigorous and acquisitive Polar policies.<sup>65</sup>

#### VIII. THE SIGNIFICANCE OF THIRD PARTY AFFIRMATIVE NON-RECOGNITION OF ANTARCTIC CLAIMS SINCE 1961

If there was any doubt in the period prior to 1961 that statements of non-recognition of Australia's Antarctic claim by non-claimant States did not detract from its legal strength, then there certainly has not been any doubt since Antarctica has been governed by the Antarctic Treaty System (ATS), founded by the 1959 Antarctic Treaty. By Article IV(ii), nothing that happens during the life of the Treaty is to affect the position regarding sovereignty as it was when the Treaty entered into force in 1961.<sup>66</sup> The legal strength of Australia's claim is therefore not impacted by a lack of recognition, or even by positive statements of non-recognition, not only under the regime of territorial acquisition but also under the Antarctic Treaty, since Article IV specifically does not require recognition of a claim.<sup>67</sup>

One occasion since entry into force of the Antarctic Treaty in 1961 that has afforded an opportunity for members of the international community to make express statements of non-recognition has been the receipt of submissions by the Commission on the Limits of the Continental Shelf (CLCS). The Antarctic claimant States agreed in 2004 that each State would decide either to submit data on Antarctica but request the Commission not to take action in respect of the Antarctica data, or not to submit

<sup>64</sup> 'Nothing contained in the present treaty shall be interpreted as:

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.'

<sup>65</sup> Under-Secretary of State (Sumner Welles) to the President (Franklin Roosevelt) (6 January 1939) in Bush, *Antarctica and International Law* (n 43) 440.

<sup>66</sup> 'No acts or activities taking place while the present treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present treaty is in force.'

<sup>67</sup> I Hodgson-Johnston, 'Australian Politics and Antarctic Sovereignty: Themes, Protagonists, and Antagonists' (2015) 7(3) *Australian Journal of Maritime & Ocean Affairs* 184.

data.<sup>68</sup> Australia chose to submit data. Overall, the response of the international community to the submissions by Antarctic claimant States through communications as recorded on the website of the CLCS was 'relatively muted'.<sup>69</sup>

A French communication in response to Australia's submission noted the potential overlap of the continental shelf in the Kerguelen Plateau, and that Australia had emphasised in its submission that its claim for an extended continental shelf was without prejudice to any subsequent delimitation between the two States. France stipulated that it had no objection to the Commission considering and making recommendations on those parts of Australia's submission that concern areas bordering on French territories to the extent that such recommendations are without prejudice to any final delimitation of the continental shelf concluded subsequently between France and Australia.<sup>70</sup> This could be regarded as recognition of Australia's title, insofar as it suggested the possibility of the two States delimiting their mutual boundary at some future point.

In response to Australia's submission to the CLCS, the United States sent a diplomatic Note to the Commission that, referencing Article IV of the Antarctic Treaty, stated that 'the United States does not recognize any State's claim to territory in Antarctica and consequently does not recognize any State's rights over the seabed and subsoil of the submarine areas beyond and adjacent to the continent of Antarctica'.<sup>71</sup> Russia, Japan, the Netherlands, Germany and India sent similar Notes.<sup>72</sup>

Article IV(c) by which nothing contained in the Treaty shall be interpreted as 'prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica' is significant primarily not because recognition or non-recognition would detract from the strength of the claim in question but insofar as it explicitly permits nationals of one State to make use of the Antarctic continent without deferring to the jurisdiction of the State/s on whose territory the activity is taking place.

The terms of Article IV have led to an ongoing bifurcation in Australia's approach to the AAT. On the one hand, Australia must respect the fact that other States do not respect its title to territory and hence Australia should not enforce Australian law against foreign nationals. But, given its own confidence in its *de jure* sovereignty, the Australian Government can 'be explicit in [its] discourse about the existence of the AAT, while still being faithful to its obligation under Article IV(2)',<sup>73</sup> and can legislate for the activities of its own nationals in the AAT. At first, Australia relied primarily on nationality as a basis of jurisdiction, providing broad exemptions for foreign nationals

<sup>68</sup> P Willetts, *Delimitation of the Argentine Continental Shelf*. South Atlantic Council Occasional Papers No 14 (May 2016, updated September 2016) <<http://www.staff.city.ac.uk/p.willetts/SAC/OP/OP14UPDT.PDF>> 11.

<sup>69</sup> KN Scott and DL VanderZwaag, 'Polar Oceans and Law of the Sea' in DR Rothwell *et al.* (eds), *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 740.

<sup>70</sup> Permanent Mission of France to the United Nations, Note dated 28 March 2005, UN Commission on the Limits of the Continental Shelf <[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/clcs\\_03\\_2004\\_los\\_fra\\_en.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_fra_en.pdf)>.

<sup>71</sup> United States Mission to the United Nations, Note dated 3 December 2004, UN Commission on the Limits of the Continental Shelf <[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/aus04/clcs\\_03\\_2004\\_los\\_usatext.pdf](https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/clcs_03_2004_los_usatext.pdf)>.

<sup>72</sup> For these see <[https://www.un.org/Depts/los/clcs\\_new/submissions\\_files/submission\\_aus.htm](https://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm)>.

<sup>73</sup> I Hodgson-Johnston, 'Australian Politics and Antarctic Sovereignty: Themes, Protagonists, and Antagonists' (2015) 7(3) *Australian Journal of Maritime & Ocean Affairs* 184.

of ATS members and third States, but it has more recently asserted a general territorial basis of jurisdiction.<sup>74</sup>

Ultimately, the most significant connection between Antarctic sovereignty and non-recognition may stem from the fact that sovereignty is a liminal concept, by which is meant that, if and where illegality becomes extreme, it can convert into a new standard of legality.<sup>75</sup> In other words, if the freedom given to States under Article IV to ignore those rights of other States usually associated with sovereignty leads to a de facto situation that is too out of step with the de jure perspective of claimant States committed to preserving their claims, the Article IV agreement to disagree in respect of sovereignty will become so hypothetical, and attending to jurisdictional conundrums so complex, as to potentially render Article IV inadequate as a basis for cooperation in managing Antarctic affairs. In such an eventuality, the ATS could conceivably implode.<sup>76</sup>

#### IX. CONCLUSIONS

Recognition has several functions in international law;<sup>77</sup> it is probably referred to most often in relation to the recognition of States and recognition of governments,<sup>78</sup> although those notions of recognition should not be confused with recognition of title to territory. As Warbrick has noted, recognition 'is a difficult subject – though not exceptionally so'.<sup>79</sup> And, while the law and practice of recognition may be relatively complex, that regarding non-recognition is even less clear and more complex.<sup>80</sup>

Noting that many commentators appear to imply that the fact that so few States have recognised Australia's Antarctic claim detracts in some way from the validity of the claim, this article has interrogated the international legal regime of territorial acquisition to highlight the need to distinguish amongst categories of action that might otherwise all be termed 'non-recognition'.

The most important distinction was found to be that between non-recognition on the part of just any third party State and non-recognition on the part of a third party State at the same time advancing a competing claim to the territory in question. The analysis has found that widespread non-recognition of Australia's claim on the part of States not at the same time advancing a competing claim of their own is not legally relevant to the validity of Australia's title to the Australian Antarctic Territory.

<sup>74</sup> This in turn raises enforcement dilemmas. Stephens and Boer (n 13) 65.

<sup>75</sup> H Kalmo, 'A Matter of Fact? The Many Faces of Sovereignty' in H Kalmo and Q Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge University Press 2011) 114.

<sup>76</sup> On the future of sovereignty and the ATS see, *inter alia*, L Valentin Ferrada, 'Five Factors That Will Decide the Future of Antarctica' (2018) 8(1) *The Polar Journal* 84; AD Hemmings, 'The Hollowing of Antarctic Governance' in PS Goel, R Ravindra and S Chattopadhyay (eds), *Science and Geopolitics of the White World: Arctic-Antarctic-Himalaya* (Springer Nature 2017) 17; SV Scott, 'Competing Claims and Boundary Disputes' in K Scott and D VanderZwaag (eds), *The Edward Elgar Research Handbook on Polar Law* (Edward Elgar 2020) 146; and KN Scott, 'Managing Sovereignty and Jurisdictional Disputes in the Antarctic: The Next Fifty Years' (2010) 20 *Yearbook of International Environmental Law* 3.

<sup>77</sup> C Warbrick, 'States and Recognition in International Law' in MD Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 217.

<sup>78</sup> The prevailing position is that recognition is not determinative for the acquisition of statehood, although it may be pertinent in the sense that an act of recognition may provide evidence that criteria for statehood have been met. <sup>79</sup> Warbrick (n 77) 248. <sup>80</sup> *ibid* 252.